APPENDIX A.

COURT OF APPEALS OF KENTUCKY

STOY DECKER and ROBERT MATTHEW COX, - *Appellants,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

NOTICE.

Filed November 4, 1960.

TO: Honorable John B. Breckinridge, Attorney General; Honorable Troy D. Savage, Assistant Attorney General, Counsel for Appellee, Capitol Building, Frankfort, Kentucky.

You will please take notice that the attached Motion will be brought on for hearing before Honorable Robert A. Bird, Chief Justice of the Court of Appeals, forthwith in his chambers or such other time as may be convenient with the Court.

(s) WALTER B. SMITH,
Attorney for Appellants.

MOTION FOR STAY PENDING REVIEW BY SUPREME COURT OF THE UNITED STATES.

TO: Chief Justice of the Court of Appeals of Kentucky:

Comes the appellants, Stoy Decker and Robert Matthew Cox, by counsel and move the Court to stay the issuance of a mandate in the above styled case wherein an opinion was rendered this the 4th day of November, 1960, and issue an order staying the execution and enforcement of said mandate for a period of forty-five (45) days from date in order that a proper and adequate application for an appeal be made to a Justice of the Supreme Court of the United States for a review of the above styled case.

Counsel for the appellants further moves this Court to permit the appellants to remain on the present bond during the stay pending the review by the Supreme Court.

Counsel further states that an adequate security for the cost will be posted in compliance with the order of this Court.

The above motion is made by favor of Rule 1.345 of Rules of the Court of Appeals of Kentucky.

This motion for a stay pending review by the Supreme Court is made because the appellants have been deprived of their substantial and civil rights, as well as being in direct conflict with the Eighth Amendment of the Constitution of the United States, and for other reasons which will be set forth by the appellants when the application for the appeal is made to a Justice of the Supreme Court.

(s) WALTER B. SMITH,
Attorney for Appellants.

CERTIFICATE.

This is to certify that a copy of the Notice and Motion herein were delivered to the Office of the Attorney General, Honorable John B. Breckinridge, at 10:00 A.M., November 4, 1960.

(s) WALTER B. SMITH

ORDER STAYING EXECUTION AND ENFORCEMENT OF MANDATE.

This cause having come on for hearing, upon the application of appellants for a stay of the enforcement and execution of the mandate pending an application for an appeal to be made to a Justice of the Supreme Court, and the Court, being advised, orders that the motion therefor be sustained, and the stay of execution and enforcement of the mandate is granted for a period of forty-five (45) days from this date.

It appearing to the Court that appellants are already on bond, no additional security is required.

IT IS SO ORDERED.

Entered this 10th day of November, 1960.

(s) Robert B. Bird, Chief Justice,
Court of Appeals of Kentucky.

NOTICE—MOTION—CERTIFICATE.

TO: Honorable John B. Breckinridge, Attorney General,
Honorable Troy D. Savage,
Assistant Attorney General,
State Capitol,
Frankfort, Kentucky.

Please take notice that on Friday, December 23, 1960, before a Judge of the above Court, at 10:00 A.M., Eastern Standard Time, or as soon thereafter as they may be heard, the appellants will make the following motion as set out herein, and said motion will be filed for submission to said Judge in the office of the Clerk of the Court of Appeals.

MOTION FOR EXTENSION OF TIME FOR A PERIOD OF FORTY-FIVE (45) DAYS STAYING ENFORCEMENT AND EXECUTION OF MANDATE IN THE WITHIN CASE.

Comes the appellants by counsel and move the Court to grant an extension of forty-five (45) days from December 26, 1960, to February 8, 1961, for a stay of the enforcement and execution of the mandate in the within style case for the purpose of filing an appeal to be made to a Justice of the Supreme Court for the following reasons:

1. Counsel for the appellants is involved in trial of cases through the 22nd of December, 1960.

2. This being during the Holiday Season it is almost impossible to devote one's time to the preparation of an exacting pleading necessary to file in the within case.

3. Current matters and the preparation for trial of three other very important cases make it extremely difficult to prepare and file the appeal necessary in the within case at this time.

Thus counsel for the appellants respectfully requests that this stay be extended forty-five (45) days from the 26th day of December, 1960, to February 8, 1961.

This motion is made under favor of Rule 1.345(b) of The Rules of the Court of Appeals of Kentucky.

Dec. 22, 1960.

Respectfully submitted,

(s) WALTER B. SMITH,
Attorney for the Appellants.

CERTIFICATE.

A copy of the within Pleadings was on December 22, 1960, personally delivered to the office of the Attorney General and left at the office of Honorable Troy Savage.

Given under my hand this December 22, 1960.

(s) WALTER B. SMITH,
Attorney for Stoy Decker and Robert Matthew Cox, Appellants.

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT

December 29, 1960

Hon. Walter B. Smith
Attorney at Law
Columbia Building
Louisville 2, Kentucky

Hon. John B. Breckinridge
Attorney General
Capitol Building
Frankfort, Kentucky

Hon. Troy D. Savage
Assistant Attorney General
State Capitol Building
Frankfort, Kentucky

In re: Decker, et al vs. Commonwealth of Kentucky

Gentlemen:

Appellants' motion for extension of time of 45 days or until February 8, 1961, staying enforcement and execution of mandate has been SUSTAINED by the Court.

Very truly yours,

(s) Doris Owens, Clerk
(s) By: Drexell R. Davis
Deputy Clerk

APPENDIX B.

Rendered: February 5, 1960.

STOY DECKER and ROBERT MATTHEW COX, - *Appellants.*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

APPEAL FROM THE JEFFERSON CIRCUIT COURT,
CRIMINAL BRANCH—SECOND DIVISION
HONORABLE L. B. CURTIS, JUDGE.

PER CURIAM.

Appellants, Stoy Decker and Robert M. Cox were found guilty on a charge of conspiracy under KRS 437.110. The punishment of each was fixed at a fine of $2,500 and imprisonment in the county jail for a period of four years.

They have moved for an appeal and are claiming divers errors.

It will be noted that Floyd Guinn was convicted with Decker and Cox and that his appeal is handled in a separate opinion of this date.

Upon examination of the record we find no prejudicial error as to these appellants. The motion for appeal is therefore denied and the judgment of the trial court is affirmed as to them.

Attorneys for Appellants:
RALPH H. LOGAN,
HARDY & LOGAN,
506 Jefferson Street,
Louisville, Kentucky.

Attorneys for Appellee:
JO M. Ferguson, Attorney General,
DAVID SEBREE, Asst. Atty. General,
Frankfort, Kentucky.

Commonwealth of Kentucky }
Court of Appeals } Set.

I, Doris Owens, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the Per Curiam Order delivered by the Court of Appeals on February 5, 1960, in the case of Stoy Decker, and Robert Matthew Cox, appellants versus Commonwealth of Kentucky, Appellee, appeal from Jefferson Circuit Court, Criminal Branch, Second Division, as the same appears from the records and files of my office.

Witness my hand and seal, this the 1st day of February, 1961.

(s) Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

331 S. W. 2d p. 886

FLOYD GUINN, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

Court of Appeals of Kentucky
February 5, 1960

PROSECUTION FOR CONSPIRACY.

Prosecution for conspiracy. The Circuit Court, Jefferson County, Criminal Branch, Second Division, L. R. Curtis, J., entered judgment of conviction and defendant moved to appeal. The Court of Appeals, Bird, J., held that evidence which contained no proof of any act, statement or circumstance creating more than a suspicion of defendant's complicity as a conspirator was insufficient to sustain conviction.

Motion for appeal granted and judgment reversed.

CONSPIRACY KEY 47

Evidence which contained no proof of act, statement or circumstance that created more than a suspicion of defendant's complicity as a conspirator was insufficient to sustain conviction. KRS 437.110.

Ralph H. Logan, Hardy & Logan, Rush Nicholson, Louisville, for appellant.

Jo M. Ferguson, Atty. Gen., David Sebree, Asst. Atty. Gen., for appellee.

BIRD, Judge.

Appellant, Floyd Guinn, was found guilty of conspiracy under KRS 437.110 and his punishment was fixed at a fine of $300 and imprisonment in the county jail for a period of two years. He has moved for an appeal.

Appellant was convicted with Stoy Decker and Robert M. Cox whose sentences have this day been upheld by this Court. As to this appellant, however, we have concluded that the evidence was insufficient and that appellant should have been given a directed verdict. We have carefully examined the lengthy record and it discloses barely enough to create a suspicion of appellant's participation in the conspiracy. This appellant and his co-defendants were seen together on the night of the crime and it is shown that they were associates having mutual interests in the subject out of which the trouble arose. However, there is no proof of act, statement or circumstance that creates more than a suspicion of his complicity as a conspirator. This will not sustain a conviction and a directed verdict should have been given for this appellant. Baird v. Commonwealth, 241 Ky. 795, 45 S. W. 2d 466; Gammons v. Commonwealth, Ky., 305 S. W. 2d 932.

The motion for appeal is granted and the judgment is reversed for proceedings not inconsistent with this opinion.

ORDERS—KENTUCKY COURT OF APPEALS
Fall Term, November 4, 1960

Decker & Cox v. Commonwealth — Jefferson

The Court being sufficiently advised, it is considered that the petition of appellants for a rehearing be and the same is overruled.

Commonwealth of Kentucky }
Court of Appeals } Sct.

I, Doris Owens, Clerk of the Court of Appeals certify that the above is a true and correct copy of the order overruling the petition for rehearing filed in the case of Decker & Cox, Appellants versus, Commonwealth of Kentucky, Appellee, in an appeal from the Jefferson Circuit Court, Crim-

inal Branch, Second Division, as the same appears from the records and files of my office.

Witness my hand and seal, this the 1st day of February, 1961.

(s) Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

APPENDIX C.

Pertinent Portions of the Constitution of the United States.

AMENDMENT IV.

"Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VIII.

"Punishment for Crime.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Pertinent Portions of the Constitution of Kentucky.

Section 10 of the Bill of Rights.

Security from search and seizure; conditions of issuance of warrant. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Section 17 of the Bill of Rights.

Excessive bail or fine, or cruel punishment, prohibited. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

KRS 431.075 COMMON-LAW OFFENSES, PENALTIES FOR:

Any person convicted of a common-law offense the penalty for which is not otherwise provided by statute shall be imprisoned in the County Jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both (*1950*, c. 169).

KRS 437.110 (1241a-1; 1241a-2) CONSPIRACY: BANDING TOGETHER FOR UNLAWFUL PURPOSES:

(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.

(2) No two or more persons shall confederate or band themselves together and go forth for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not.

(3) Any person who violates this section shall be punished by fine or imprisonment, or both, in the discretion of the jury. (*1948*, c. 22).

[redacted] ILE COPY

No. 738

Office Supreme Court, U.S.
FILED
MAR 17 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

TROY DECKER and
ROBERT MATTHEW COX — PETITIONERS

VS — RESPONSE TO PETITION FOR WRIT OF CERTIORARI

COMMONWEALTH OF KENTUCKY — RESPONDENT

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

TROY D. SAVAGE
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

Copy of within response to petition for writ of certiorari mailed to Hon. Walter R. Smith, Attorney for Petitioners, Columbia Building, Louisville 2, Kentucky

This the 16th day of March, 1961

Assistant Attorney General

INDEX

	Page
RESPONSE NO. I	1-2
RESPONSE NO. II	2-3
RESPONSE NO. III	3-4
CONCLUSION	5

CITATIONS

U.S. Supreme Court Rule 23, 1-4	1-2
Hanson v. Denckla, 78 S. Ct. 1228, 357 U.S. 235 Rehearing denied, 358 U.S. 853	2
Eleazar v. U.S., C.A. Alaska, 1956, 241 F. 2d 385	3
Hong v. U.S., C.A. Mo., 1953, 208 F. 2d 1916	3
Much v. Commonwealth, 207 Ky. 417, 269 SW 315	3
Hoover v. Commonwealth, 214 Ky. 24, 278 SW 349	3
Illinois Central v. Commonwealth, 25 KLR 297, 74 SW 1097	3
Walters v. City of St. Louis, 347 U.S. 231, 28 U.S.C.A. 1257	3
Hanson v. Denckla, supra	3
City of Tacoma v. Taxpayers of Tacoma, 202 U.S. 446	3
Bell Telephone Co. v. Ry. Commissioners, 297 U.S. 471	3
Much v. Commonwealth, supra	4
Hoover v. Commonwealth, supra	4

IN THE

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OCTOBER TERM, 1960

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ROBERT MATTHEW COX ..... PETITIONERS

VS. **RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

RESPONSE NO. 1

THE PETITIONERS HAVE NOT COMPILED WITH RULE 23. 1(f) OF THE UNITED STATES SUPREME COURT.

Comes now the respondent, Commonwealth of Kentucky, and for the first response to appellant's petition for writ of certiorari states the petitioner's request for a writ of certiorari should be denied because he has failed to comply with the rules of this Court in that he has failed to specify the stage in the proceedings in the court of first instance, and in the Appellate Court at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the Federal question was timely and

properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Rules of the U.S. Supreme Court Rule 23, 1(f).

RESPONSE NO. II

NO FEDERAL QUESTION RESERVED OR PASSED UPON BY THE STATE OF KENTUCKY'S COURTS

Even if the petitioner had attempted to comply with U.S. Supreme Court Rule 23, 1(f), it would not have been possible because the two Federal questions set out in this petition for a rehearing, at pages 2 and 3 thereof, were not timely raised in the Jefferson Circuit Court (the trial court), nor were they preserved and presented to the Court of Appeals for the State of Kentucky, nor were they passed upon by the Court of Appeals of the State of Kentucky.

The second constitutional question alleged to have been violated by the courts of the State of Kentucky, to wit, that the imposition of a $2,500 fine and four years in the county jail amounts to cruel and inhuman punishment in violation of Amendment Eight of the Constitution of the United States, was not raised at all in the circuit or lower court of the State of Kentucky and was first mentioned in the Court of Appeals of the State of Kentucky in a petition for a rehearing.

A question first raised in a petition for rehearing in the state's highest court is not timely and the Supreme Court will not take jurisdiction of that issue. Hanson v. Denckla, 78 S.Ct. 1228, 357 U.S. 235, 2 L ed 2d 1238, rehearing denied 358 U.S. 858.

The other purported Federal constitutional question set out by the petitioner at page 2 of his petition, to wit, that the introduction in evidence of a teargas gun obtained by a search of an automobile at a time when the petitioners were not under arrest deprived these petitioners of their guarantee against unlawful search and seizure under the Fourteenth Amendment to the U.S. Constitution, was not properly preserved in the lower court as no objection was made to the introduction of this evidence at the time it was introduced. See the evidence set out in the petition for writ of certiorari at pages 15, 16 and 17.

That a petitioner waives his right to object to the introduction of evidence obtained under an illegal search and seizure by failure to object at the time of its introduction is well established. Eleazar v. U.S., C.A., Alaska, 1956, 241 F.2d 385; Honig v. U.S., C.A., Mo., 1953, 208 F. 2d 1916, and many other cases.

The law is the same in the State of Kentucky. Minch v. Commonwealth, 207 Ky. 417, 269 SW 315; Hoover v. Commonwealth, 214 Ky. 24, 278 SW 549; Illinois Central Railroad v. Commonwealth, 25 KLR 297, 74 SW 1097.

The third question set out in the petition for a rehearing concerns the interpretation and application of Kentucky statutes and does not involve any Federal question.

That upon a petition for writ of certiorari from a judgment of the state courts the Federal question must have been raised and decided by the state courts before the U.S. Supreme Court will take jurisdiction, is not subject to question at this time, having been decided on many occasions. Walters v. City of St. Louis 347 U.S. 231, 28 U.S.C.A., § 1257; Hanson v. Denckla, supra; City of Tacoma v. Taxpayers of Tacoma, 202 U.S. 446; Bell Telephone Co. of Nebraska v. Ry. Commissioners, 297 U.S. 471.

The best that can be said in the instant case is that the Court of Appeals for the State of Kentucky, the highest court in said state, ruled by inferences any Federal constitutional questions that may have been before it as this Court did not write an opinion but merely ruled on a motion of these petitioners for an appeal to it, overruling said motion. See page 26 of petitioners' petition for writ of certiorari, for excerpt of opinion.

RESPONSE NO. III

CASE IN COURT BELOW DECIDED ON ADEQUATE NON-FEDERAL QUESTIONS.

As stated above, the question of cruel and inhuman punishments was not raised in the state courts except in a petition for a rehearing in the state's highest court, the Court of Appeals. The other Federal question—deprivation of protection against illegal search and seizure by introduction of evidence obtained through

alleged illegal search—was not presented to the Court of Appeals as a Federal question, but was presented and argued in the briefs on the issue of the preservation of the error in the lower courts by the accused making a motion at the close of his cross examination of the witness introducing the alleged incompetent evidence when it was and is admitted that there was no objection made at the time the alleged incompetent teargas gun was introduced. The attorney for the present petitioners, at the trial in the lower court in the State of Kentucky made no objection to the introduction of the teargas gun, nor did he object to the demonstration performed before the jury by the use of the teargas gun, but elected to cross examine the witness at length concerning the teargas gun and other items of personalty found in the automobile, especially a knife found therein at the time of the search, and having failed to elicit anything of value favorable to his clients by said cross examination, moved that the evidence concerning the teargas gun be excluded. The law is well settled in this state that this is not a timely objection. Minch v. Commonwealth, 207 Ky. 417, 269 SW 315; Hoover v. Commonwealth, 214 Ky. 24, 278 SW 549.

This issue of whether or not the motion to exclude the evidence was a timely objection to its introduction, or conversely stated: Did the failure to object at the time of the introduction of the alleged competent evidence because of it having been obtained by illegal search waive their right to have it excluded?—is a question not even involving a section of the Kentucky State Constitution, but concerns a state procedural matter and cannot, in any sense, be considered a Federal question.

We assume that the Court of Appeals, by denying the present petitioners' motion in that Court for an appeal, impliedly ruled upon the issue of the proper exclusion of this item of evidence that is to say, they impliedly ruled that by failure to object they waived their right to object to the competency of this evidence on the ground it was acquired by improper search, but even so, it only involves a state procedural question.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL
BY: Troy D. Savage
TROY D. SAVAGE
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT